

THE HONORABLE THOMAS S. ZILLY
TRIAL DATE: May 14, 2012

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AT&T MOBILITY, LLC, a Delaware limited
liability corporation,

Plaintiff,

vs.

HOLADAY-PARKS-FABRICATORS, INC.,
a Washington Corporation,

Defendant,

EVERGREEN POWER SYSTEMS, INC., a
Washington corporation; SOURCE NORTH
AMERICA CORPORATION, an Illinois
corporation d/b/a Ace Tank & Fueling
Equipment, a Division of Source North
America Corporation; and PHILLIPS PUMP,
LLC a Connecticut domestic limited liability
company

Third-Party Defendants

No. 2:10-cv-00468 TSZ

**JOINTLY PROPOSED JURY
INSTRUCTIONS**

JOINTLY PROPOSED JURY INSTRUCTIONS
Cause No. 2:10-cv-00468 TSZ – 1

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1. DUTY OF JURY

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

Ninth Circuit Model Civil Jury Instructions, no. 1.1B

1 **2. BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE**

2 When a party has the burden of proof on any claim or affirmative defense by a
3 preponderance of the evidence, it means you must be persuaded by the evidence that the claim
4 or affirmative defense is more probably true than not true.

5 You should base your decision on all of the evidence, regardless of which party
6 presented it.
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Ninth Circuit Model Civil Jury Instructions, no. 1.3 (modified)

3. TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS

You should decide the case as to each party separately.

Instruction numbers [] through [] apply to all claims and defenses.

Instruction numbers [] through [] apply only to AT&T Mobility's claims against Holaday-Parks and Holaday-Parks' defenses to those claims.

Instruction numbers [] through [] apply only to Holaday-Parks' claims against Evergreen and Evergreen's defenses to those claims.

Instruction numbers [] through [] apply only to Holaday-Parks' claims against Source North American and Source North America's defenses to those claims.

Ninth Circuit Model Civil Jury Instructions, no. 1.5 (modified)

4. WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of the sworn testimony of any witness; the exhibits which are received into evidence; and any facts to which the lawyers have agreed.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I have given a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Ninth Circuit Model Civil Jury Instructions, nos. 1.6 and 1.7 (combined).

1 **5. DIRECT AND CIRCUMSTANTIAL EVIDENCE**

2 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact,
3 such as testimony by a witness about what that witness personally saw or heard or did.
4 Circumstantial evidence is proof of one or more facts from which you could find another fact.
5 You should consider both kinds of evidence. The law makes no distinction between the
6 weight to be given to either direct or circumstantial evidence. It is for you to decide how
7 much weight to give to any evidence.

8 By way of example, if you wake up in the morning and see that the sidewalk is wet,
9 you may find from that fact that it rained during the night. However, other evidence, such as a
10 turned on garden hose, may provide a different explanation for the presence of water on the
11 sidewalk. Therefore, before you decide that a fact has been proved by circumstantial
12 evidence, you must consider all the evidence in the light of reason, experience, and common
13 sense.

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18 Ninth Circuit Model Civil Jury Instructions, no. 1.9 (including example in comment)
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6. RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Ninth Circuit Model Civil Jury Instructions, no. 1.10.

1 **7. CREDIBILITY OF WITNESSES**

2 In deciding the facts in this case, you may have to decide which testimony to believe
3 and which testimony not to believe. You may believe everything a witness says, or part of it,
4 or none of it. Proof of a fact does not necessarily depend on the number of witnesses who
5 testify about it.

6 In considering the testimony of any witness, you may take into account:

- 7 (1) the opportunity and ability of the witness to see or hear or know the things testified to;
8 (2) the witness's memory;
9 (3) the witness's manner and demeanor while testifying;
10 (4) the witness's interest in the outcome of the case and any bias or prejudice;
11 (5) whether other evidence contradicted the witness's testimony;
12 (6) the reasonableness of the witness's testimony in light of all the evidence; and
13 (7) any other factors that bear on believability.

14 The weight of the evidence as to a fact does not necessarily depend on the number of
15 witnesses who testify about it.

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20 Ninth Circuit Model Civil Jury Instructions, no. 1.11
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8. CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty.

Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these

1 restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that
2 would require the entire trial process to start over. If any juror is exposed to any outside
3 information, please notify the court immediately.

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15 Ninth Circuit Model Civil Jury Instructions, no. 1.12
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9. TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the envelope in the jury room. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Ninth Circuit Model Civil Jury Instructions, no. 1.14 (modified).

10. QUESTIONS TO WITNESSES BY JURORS

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Ninth Circuit Model Civil Jury Instructions, no.

1 **11. BENCH CONFERENCES AND RECESSES**

2 From time to time during the trial, it may become necessary for me to talk with the
3 attorneys out of the hearing of the jury, either by having a conference at the bench when the
4 jury is present in the courtroom, or by calling a recess. Please understand that while you are
5 waiting, we are working. The purpose of these conferences is not to keep relevant information
6 from you, but to decide how certain evidence is to be treated under the rules of evidence and
7 to avoid confusion and error.

8 Of course, we will do what we can to keep the number and length of these conferences
9 to a minimum. I may not always grant an attorney's request for a conference. Do not consider
10 my granting or denying a request for a conference as any indication of my opinion of the case
11 or of what your verdict should be.

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18 Ninth Circuit Model Civil Jury Instructions, no. 1.18 (modified)
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12. **OUTLINE OF TRIAL**

Trials proceed in the following way: First, each party may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant and third-party defendants may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff and third-party defendants may cross-examine. The third parties will then each have an opportunity to present their evidence and each other party will have the right to cross examine those witnesses.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Ninth Circuit Model Civil Jury Instructions, no. 1.19 (modified).

13. STIPULATED TESTIMONY

[Use only if we enter stipulation regarding a witness' testimony]

The parties have agreed what [*witness*]'s testimony would be if called as a witness.
You should consider that testimony in the same way as if it had been given here in court.

Ninth Circuit Model Civil Jury Instructions, no. 2.1

14. STIPULATIONS OF FACT

The parties have agreed to certain facts which will be placed into evidence as Exhibit _____. You should therefore treat these facts as having been proved. [Use with list of undisputed facts.].

Ninth Circuit Model Civil Jury Instructions, no. 2.2 (modified).

15. DEPOSITION IN LIEU OF LIVE TESTIMONY

[To be used in event deposition is read into record in lieu of live testimony.]

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial. You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

Ninth Circuit Model Civil Jury Instructions, no. 2.4 (modified).

16. **EXPERT OPINIONS**

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Model Civil Jury Instructions, no. 2.11.

17. EVIDENCE IN ELECTRONIC FORMAT

Those exhibits capable of being displayed electronically will be available to you in that form, as well as in paper form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room to review evidence in an electronic format, if you wish.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. If you need additional equipment or supplies, you may make a request by sending a note.

In the event of any technical problem, or if you have questions about how to operate the computer or other equipment, you may send a note to the clerk, signed by your foreperson or by one or more members of the jury. Be as brief as possible in describing the problem and do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with the clerk present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non-juror other than to describe the technical problem or to seek information about operation of equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to make sure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform

1 me immediately and refrain from viewing such materials. Do not remove the computer or any
2 electronic data disk from the jury room, and do not copy any such data.

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13 Ninth Circuit Model Civil Jury Instructions, no. 2.14
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18. DUTY TO DELIBERATE

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Ninth Circuit Model Civil Jury Instructions, no. 3.1.

1 **19. COMMUNICATION WITH COURT**

2 If it becomes necessary during your deliberations to communicate with me, you may
3 send a note through the marshal, signed by your presiding juror or by one or more members of
4 the jury. No member of the jury should ever attempt to communicate with me except by a
5 signed writing; I will communicate with any member of the jury on anything concerning the
6 case only in writing, or here in open court. If you send out a question, I will consult with the
7 parties before answering it, which may take some time. You may continue your deliberations
8 while waiting for the answer to any question. Remember that you are not to tell anyone—
9 including me—how the jury stands, numerically or otherwise, until after you have reached a
10 unanimous verdict or have been discharged. Do not disclose any vote count in any note to the
11 court.
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Ninth Circuit Model Civil Jury Instructions, no. 3.2.

20. RETURN OF VERDICT

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

Ninth Circuit Model Civil Jury Instructions, no. 3.3.

21. DUTY OF JURY

Members of the Jury: Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you as to the law of the case. Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

Ninth Circuit Model Civil Jury Instructions, no. 1.1C (modified).

1 **22. LIABILITY OF CORPORATIONS—SCOPE OF AUTHORITY NOT IN ISSUE**

2 Under the law, a corporation is considered to be a person. It can only act through its
3 employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of
4 its employees, agents, directors, and officers performed within the scope of their authority.
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20 Ninth Circuit Model Civil Jury Instructions, no. 4.2
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1 Jointly Presented by:

2 /s/ Seann C. Colgan

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JOINTLY PROPOSED JURY INSTRUCTIONS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Plaintiff herein.

On April 9, 2012, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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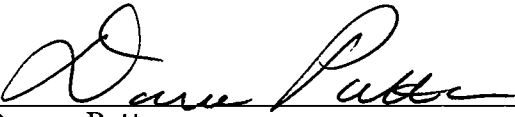
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2 I declare under penalty of perjury under the laws of the State of
3 Washington that the foregoing is true and correct.

4 DATED: April 9, 2012 at Seattle, Washington.

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6 
Donna Patterson